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June 16, 2015

e-filed

Gary Shinnors
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: Re: A.S.C. Contracting Corp., Employer; and
Highway, Road & Street Construction Laborers, Local 1010,
LIUNA, AFL-CIO, Petitioner; and Local 175, United Plant &
Production Workers, IUJAT, Intervenor, (Incumbent Union)
Case No. 29-RC-150622

Dear Sir:

Local 175, United Plant & Production Workers , IUJAT makes this Request for Review of the Decision and Certification of Representative issued on June 3, 2015 by Regional Director, James G. Paulson, for the following reason:

The policy, procedure and integrity of the Board's process was undermined by the Employer having submitted a knowingly false list of employees against which the Region made the Administrative determination that a "showing of interest" existed; resulting in a determination that one existed when it did not.

The facts of this case present a substantial question of law or policy for which there is no known precedent under the new rules for representation petitions where failing to claim errors in the determination of a showing of interest in ones Statements of Position precludes the Region from correcting a potential error in its administrative determination that a showing of interest existed when it may not have existed due to a false submission of a list of employees.

There is a compelling reason for reconsideration of an important Board rule or policy related to the new rules imposed regarding waiver of claims if not set forth in the new requirement concerning Statements of Position.

In this case the Employer submitted a typed list, (not its actual payroll records), setting forth five (5) individuals names it claimed worked in the relevant payroll period when asked for their "payroll" record for the week ending April 19, 2015. That list was provided to Local 175 with the Employer's Statement of Position filed on April 29, 2015 around noon. The next day a hearing was about to be held regarding the Petition for Election filed by Local 1010; when the parties, based upon the Region's determination of a showing of interest, Stipulated to an Election dated April 30, 2015.

Subsequently, on or about May 12, 2015, after a conversation with the attorney for the Employer; and before the election was scheduled to be held, Local 175 learned that the list of employees submitted to the Region by the Employer against which the Region matched authorization cards submitted by Local 1010 to make its showing of interest determination was knowingly false.¹ The Employer submitted five (5) names, three of whom were Local 1010 members, who not only were not on the Employer's payroll during the relevant payroll period; but who were not even eligible to vote under the Steiny-Daniels test applied to the election. The Employer knew that fact; yet still submitted their names on April 29, 2015 for use in establishing a showing of interest. The showing should only have been based upon cards submitted by either Jorge Beltron or Edgar Flores, who at the time held Local 175 membership cards. Upon information and belief the showing of interest was based on cards submitted by Local 1010 signed by the members of Local 1010 who were improperly placed on the list submitted by the Employer.

Local 175, on May 11, 2015, advised the Region that the list was false or materially in error and requested that the determination of the showing of interest be revisited by the Region;² but again, upon information and belief the Region did not perform that requested re-check; but rather advised that they would proceed to the stipulated election notwithstanding knowing, as admitted by counsel for the Employer, that the list submitted by the Employer was clearly erroneous.³

If there was no showing of interest at the initial stage of the proceeding there would have been no election; and the Petition would have been dismissed. Instead, based upon a false list, the proceeding moved to the next stage. Without the showing of interest determination there would have been no stipulated election agreement or an election. The Regional Director inquires that even if the list was erroneous, (which the Employer agreed that it was erroneous), he could not see how that fact would give the Intervenor a basis for asking that the election be set

¹ See attached e-mails dated May 11, 2015 to Teresa Poor and one dated May 12,

² See E-Mails dated May 11, 2015 from Eric Chaikin to Teresa J. Poor.

³ See E-Mail attached hereto dated May 13, 2015 from Teresa Poor, Assistant to the Regional Director that advised that the Region would go forward with the election because the Showing of Interest issue (SOI) is timely raised prior to the stipulated election agreement.

aside. Local 175 says that if the Board's process has been subverted by the Employer creating a showing of interest where one did not exist that it forms the basis for a request that the election be set aside because there should not have been any election in the first place.

Furthermore, the Statement of Position submitted by the Employer by its attorney specifically states, in bold letters: "WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT." It is obviously anticipated by the Board that the information presented within and with the Statement of Position will be true and correct. In this case it was not—it was false. So what is the remedy for this false submission?

In this case the request to review the showing of interest determination was originally raised (attacked) prior to the election. The Region did not respond to that request and advised that the election would be held. That left Local 175 with no alternative but to raise the issue again Post Election.⁴

As to the point the Regional Director made about parties not having the right to litigate or have access to the evidence of interest, Local 175 responds that it is not asking to "litigate" that issue; but only that the Board do its job and ensure that a showing of interest actually existed based on the cards submitted and the correct individuals on the payroll during the critical time frame. In this case it would be a simple check to see if either Beltron or Flores signed a card that was submitted without telling any of the parties which one did sign a valid card if in fact that is the case. The Region simply could have chosen to review it and say yes or no to the existence of a showing of interest.⁵

⁴ Local 175 does not know how it could have anticipated putting a "claim" in the Statement of Position that the showing of interest was questionable without actual facts; and when Local 175's Position Statement was submitted on April 28; a day prior to that of the Employer on April 29, 2015. (See Fax Cover sheet to Sarah Hurley Esq., and Local 175 Statement of Position filed 4/28/15). Local 175 did not see the false list of employees submitted until after the time expired for Statements of Position to be filed; and did not actually become aware of the fact that the list was false until an investigation took place after April 30, 2015. Fairness dictates that since the showing of interest was based on a knowingly false list of employees that if there was no actual showing of interest determined in retrospect that the election should not have gone forward; or in this case, should be set aside.

⁵ The Regional Director noted on page 3 of the Decision that there was no dispute that Beltron and Flores were properly on the list of workers for the week ending April 19, 2015. He does not address the issue of whether the Borja brothers and Azan Brown were improperly on the list. The attached email from the Employer's Attorney dated May 12, 2015, however, makes it clear that they were not. Rather, the Regional Director went to the issue of whether they were eligible to vote under Steiny-Daniels. He found that the Borja brothers were NOT eligible based on payroll

On the above basis Local 175 requests that the Board grant the Request for Review and make a decision whether the Regional Director has a right under the new rules for Representation Petitions to correct an error related to a Showing of Interest determination where it is established that the Employer has submitted a false, or materially erroneous document upon which a showing of interest was wholly based. The integrity of the process demands that an Employer not benefit from the submission of a false document under the new rules that provide for such limited time periods in which another party has to verify the veracity of what is put into a Statement of Position.

Respectfully submitted,


Eric B. Chaikin, Esq.

Cc: Charles Romano, President, ASC Contracting
Alfred T. DeMaria, Esq., ASC Contracting Attorney
John Peters, Local 1010
Barbara S. Mehlsack, Esq., Attorney for Local 1010

records presumably submitted by the Employer. He also said that the Region could not determine whether Azan Brown was eligible to vote. It is submitted that because the Employer had the actual payroll records that the failure of the Employer to satisfy the Region on Brown's eligibility indicates that the records failed to show he was eligible. Moreover, Local 1010 may have had records that would have shed light on the subject since the Employer would have submitted remittance reports to the Pavers District Council Benefit Funds to establish his hours in the months worked over the relevant prior period. Local 175 would have had no such records of payroll or reports for those Local 1010 members.

STATEMENT OF SERVICE

State of New York)
County of New York)

ERIC B. CHAIKIN, ESQ., states as follows:

On June 17, 2016 I served via electronic mail the within Request for Review of the Regional Director's Decision and Certification of Representative dated June 3, 2015 upon Barbara Mehlsack, Esq., counsel for Highway, Road, and Street Construction Laborers, Local 1010, at her e-mail address designated for such purposes, BMEHLSACK@GKLLAW.COM; and upon Alfred T. DeMaria, Esq., counsel for A.S.C. Contracting Corp., at his e-mail address designated for such purposes, ATDEMARIA@CBDM.COM;

And by mail to John Peters, Local 1010, Highway, Road, and Street Construction Laborers representative at his address at 34-11 35th Avenue, Astoria, NY 11106-1222 and to Charles Romano, President of A.S.C. Contracting Corp at his address at 68 Birch Hill, Albertson, NY 11507-1002

Dated: New York, New York
June 17, 2015


Eric B. Chaikin, Esq.